Supreme Court, U.S.
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No. 92-1552

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAIME GIRALDO AND LUIS FERNANDO GIRALDO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the delay before petitioners' trial violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished but the judgment is noted at 963 F.2d 380 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1992. A petition for rehearing was denied on November 25, 1992. Pet. App. 3a. On February 19, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 25, 1993. The petition was filed on March 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of conditional pleas of guilty in the United States District Court for the Central District of California, petitioners were convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner Jaime Giraldo was sentenced to 25 years' imprisonment and was fined $100,000. C.A. App. 199. Petitioner Luis Giraldo was sentenced to 17 years' imprisonment. C.A. App. 218. The court of appeals affirmed. Pet. App. 1a-2a.

1. On June 24, 1986, a federal indictment was returned charging petitioners and others with a variety of narcotics offenses. On January 28, 1987, petitioners each entered guilty pleas to two counts of the indictment; at that time, defense counsel stated that his clients were willing to waive their speedy trial rights. On September 10, 1987, petitioners withdrew their guilty pleas. Pet. App. 4a; Sept. 10, 1987, Tr. 17-18; Gov't C.A. App. 4 (Sept. 10, 1987, order);[1] see Gov't C.A. Br. 3. For a variety of reasons, the district court did not dispose of the case until May 1990. Because petitioners argue that the delay violated the Speedy Trial Act of 1974, 18 U.S.C. 3161, a detailed summary of the proceedings in the district court is appropriate.

a. At a September 28, 1987, status conference, David Kenner, counsel for petitioner Jaime Giraldo, explained that he was involved at that time in three other trials and two appeals. He requested a continuance of the trial until December 8, 1987, pursuant to

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[1] "Gov't C.A. App." refers to the Supplemental Excerpts of Record the government filed in the court of appeals.

the ends-of-justice provision of the Speedy Trial Act, 18 U.S.C. 3161(h)(8)(B)(iv), which provides for continuances based upon the need for continuity of counsel. The district court granted the continuance, thus excluding all the time between September 28, 1987, and December 8, 1987. Sept. 28, 1987, Tr. 4-5; Gov't C.A. App. 5 (Sept. 28, 1987, order); see Gov't C.A. Br. 5-6.

b. On November 2, 1987, petitioner Luis Giraldo filed a motion for discovery; because 18 U.S.C. 3161(h)(1)(F) excludes any delay attributable to pretrial motions filed by the defendant, filing the motion tolled the speedy trial clock. At a November 30, 1987, status conference, the hearing on the discovery motion was continued by mutual agreement until December 21, 1987; the trial was continued until February 2, 1988. Gov't C.A. App. 6 (Nov. 30, 1987, order), 226 (docket entry 252); Nov. 30, 1987, Tr. 4-5; see Gov't C.A. Br. 6.

c. On December 21, 1987, Kenner failed to appear for the hearing on the discovery motion; counsel for Luis Giraldo explained that Kenner was in South America working on the case. Over the government's objection, the court continued the hearing on the discovery motion until January 4, 1988. At the hearing on January 4, 1988, the district court denied the discovery motion. On the same day, however, Jaime Giraldo filed a motion to dismiss the indictment based on prosecutorial misconduct, and he requested a hearing on that motion. The motion alleged that the police had fabricated evidence included in an affidavit used to support a search warrant. The district court scheduled a February 2, 1988, hearing on the motion to dismiss, stating that a new trial date would be set at that time. Dec. 21, 1987, Tr. 5-8; Jan. 4, 1988,

Tr. 17, 19-21; Gov't C.A. App. 7 (Dec. 21, 1987, order), 8 (Jan. 4, 1988, order), 38-46 (text of motion), 210 (docket entry 259); see Gov't C.A. Br. 6-7.

d. On February 3, 1988, at the request of petitioners' counsel, the hearing on the motion to dismiss was rescheduled for February 17, 1988. On February 10, 1988, the government filed a motion to quash certain subpoenas that had been issued in connection with the motion to dismiss, and to deny an evidentiary hearing on the motion. The district court vacated the February 17, 1988, hearing date and scheduled a February 22, 1988, hearing on the various motions. On the day of the hearing, petitioners filed a memorandum in opposition to the government's motion to quash and to deny an evidentiary hearing.[2] At the hearing, it was agreed that the government would have until March 7, 1988, to reply to the allegations in petitioners' memorandum, and that a hearing on the matter would be held on March 17, 1988. The court subsequently changed the date for the hearing to March 16, 1988, but, for reasons that do not appear on the docket sheet, the March 16, 1988, hearing on the motion was not held.[3] Feb. 22, 1988, Tr. 11-20; Gov't C.A. App. 11 (Feb. 3, 1988, order), 14 (Feb. 22, 1988, order), 15 (Feb. 29, 1988, order), 228 (docket entry 272); see Gov't C.A. Br. 7-8.

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[2] Although the motion to dismiss originally was filed only by Jaime Giraldo, both petitioners joined in the memorandum and subsequent proceedings on the motion. See Gov't C.A. App. 114.

[3] The district court subsequently found that Kenner was involved substantially full time from March 1988 until December 14, 1988, in representing Barry Minkow in complex litigation, which apparently accounts for the failure to hold the motions hearing. Pet. App. 5a.

e. A status conference was held on July 27, 1988, at which the district court scheduled another status conference for August 15, 1988. At the August 15, 1988 conference, which Kenner did not attend for medical reasons, the prosecutor advised the court that the court had not yet disposed of petitioners' motion to dismiss or the government's motion to quash. The court apologized for not having acted on the motions, explaining that it believed that it had dealt with all outstanding motions. Counsel for Luis Giraldo advised the court that Kenner was involved in a trial that was anticipated to last about two months as well as another trial scheduled to start after that one. The district court then set the case for trial on October 18, 1988, but failed to set another hearing date for the motion to dismiss. Gov't C.A. App. 16 (July 27, 1988, order), 17 (Aug. 15, 1988, order); Aug. 15, 1988, Tr. 4-9; see Gov't C.A. Br. 8-9.

f. For reasons that again are not reflected on the docket sheet, trial did not commence on October 18. The docket sheet shows only that on December 8, 1988, the district court, pursuant to a stipulation entered into by both parties, continued the trial until February 28, 1989.[4] Gov't C.A. App. 18-20 (Dec. 8, 1988, order and stipulation), 212 (docket entries 284, 285), 229 (same).

g. On February 28, 1989, Kenner proposed to waive jury trial and to try the case principally by stipulation. He also requested a continuance of the trial until April 11, 1989. The prosecutor stated that the principal reason for the delay was Kenner's

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[4] As with the failure to hold the March 16, 1988, hearing, see note 3, *supra*, the reason for the continuance appears to be that Kenner was occupied with other matters. See Pet. App. 5a.

unavailability due to other trial commitments, but he voiced concerns about the Speedy Trial Act. The court stated that it "[did not have] the slightest doubt that there is no Speedy Trial Act problem in this case," and ordered Kenner to prepare a speedy trial order; Kenner did not prepare such an order. Feb. 28, 1989, Tr. 4-6; Gov't C.A. App. 21 (Feb. 28, 1989, order). In response to another stipulation by petitioners, the court on April 7, 1989, entered an order continuing the trial date until May 16, 1989, for "[g]ood cause * * * shown." Gov't C.A. App. 22-24 (Apr. 7, 1989, order and stipulation); see Gov't C.A. Br. 10.

h. On August 4, 1989, the government filed a motion requesting a status conference and the setting of a trial date. At a September 11 status conference, the district court set the trial for November 14, 1989, in order to accommodate the schedule of Kenner, who was on the eve of trial in a complex narcotics conspiracy case (the *Villabona* case), Gov't C.A. App. 25-28 (motion for status conference and trial date), 31 (Sept. 11, 1989, order); Sept. 11, 1989, Tr. 4, 6; see Gov't C.A. Br. 10.

i. At a November 3, 1989, status conference, Kenner reported that the *Villabona* case, in which both he and counsel for Luis Giraldo were involved, was still at the pretrial motions stage, and requested a continuance of the trial in this case until March 13, 1990. The court, although noting the prosecutor's dismay at the continuances, agreed to that date and scheduled a February 12, 1990, status conference to determine the progress of the *Villabona* case. The court advised Kenner that "[u]nder no circumstances" was he to take another engagement after the *Villabona* case. The court further ordered defense counsel for petitioner Luis Giraldo to draft

a speedy trial order; counsel did not do so. Nov. 3, 1989, Tr. 4-9; Gov't C.A. App. 33 (Nov. 3, 1989, order); see Gov't C.A. Br. 10-11.

j. At the status conference (which took place on February 14, 1990), Kenner advised the court that the *Villabona* trial probably would conclude between the middle and end of April 1990. Over the prosecutor's complaints that the trial had dragged on for an "ungodly long time," the court set trial for May 15, and scheduled an April 17, 1990, status conference. Feb. 14, 1990, Tr. 4-8; Gov't C.A. App. 34 (Feb. 14, 1990, order); see Gov't C.A. Br. 11.

k. At the April 17, 1990, status conference, counsel for Luis Giraldo advised the court that Kenner was still in trial in the *Villabona* case, which was expected to conclude in early May. The prosecutor observed that it appeared petitioners were seeking to set up a speedy trial issue for appeal, although they had at every point acquiesced in the successive delays of the case caused by Kenner's particularly crowded calendar. The district court replied that " '[a]cquiesce' is too mild a word," that such a claim would be "ludicrous" and "outrageous," and that if defense counsel "could stand up at that lectern and argue that with a straight face, I'd have to call the paramedics for myself." The court confirmed the trial date of May 15, 1990. Gov't C.A. App. 35 (Apr. 17, 1990, order); Apr. 17, 1990, Tr. 6-7. Trial did not commence on May 15 because Kenner still was involved in the *Villabona* trial. See Gov't C.A. Br. 12.

2. Petitioners, through different counsel, then filed a motion to dismiss the indictment with prejudice for lack of a speedy trial.

a. The district court held a May 21, 1990, hearing, at which it indicated it would deny the motion.

May 21, 1990, Tr. 29. The court explained that defense counsel had been responsible for virtually all the continuances that had been granted, and that "almost all of those continuances were greeted by utter outrage" from the prosecutor. *Id.* at 21. The court noted that petitioners had never informed the court that they wanted another lawyer who could bring the case to trial in a hurry, but rather had acquiesced in the continuances. *Id.* at 14, 18. The prosecutor also argued that the speedy trial clock had been tolled because the court had not conducted a hearing or ruled on petitioners' motion to dismiss or the government's motion to quash. The district judge observed that his personal recollection was that all motions had been ruled on. *Id.* at 10-11, 25-27. Petitioners then filed conditional guilty pleas, reserving their right to raise the speedy trial claim on appeal. *Id.* at 42-50.

b. The district court subsequently memorialized its ruling in a written order. Pet. App. 4a-6a. That order concluded that the motion to dismiss should be denied because the entire period from September 10, 1987, to May 22, 1990, was excludable both because of the outstanding pretrial motions and because of the involvement of petitioners' attorneys in other cases.

On the first point, the court stated that a discovery motion filed by the defense was pending from August 12, 1987,[5] until January 4, 1988, Pet. App. 4a, and that a motion to dismiss the indictment for

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[5] The reference to August 12, 1987, apparently was an error; the correct date was November 2, 1987. See Gov't C.A. App. 226 (docket entry 252, noting filing of discovery motion by Luis Giraldo).

prosecutorial misconduct, filed on the day the earlier motion was dismissed, remained pending in May 1990, *id.* at 4a-5a. Accordingly, that period of time was excludable under 18 U.S.C. 3161(h)(1)(F).

On the second point, the court explained that counsel for petitioner Jaime Giraldo was involved in other cases continuously from March 1988 to May 1990. The court stated that

> it would not have been reasonable for the court to have required [petitioners] to proceed to trial because their cases were joined for trial and counsel for Jaime Giraldo has been continuously engaged in representing clients in a way which did not permit him to effectively prepare for trial, taking into account the exercise of due diligence. * * * The ends of justice served by the granting of successive continuances during the period of September 10, 1987 to May 22, 1990 outweig[h] the interests of the public and [petitioners] in a speedy trial. That finding of good cause is based upon the need for continuity of counsel and the fact that the case, while not unusually complex, nevertheless requires a sufficient period for counsel to prepare for trial, and denial of that time for preparation would be likely to produce a miscarriage of justice.

Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 1a-2a. The court explained that

> [t]he record shows that the delays [petitioners] allege to be nonexcludable were caused primarily by defense counsel's numerous requests for continuances. * * * The remaining delay was due to then pending pretrial motions. * * *

> In short, the overwhelming cause of the delay in this case was [petitioners] themselves. We therefore likewise conclude that [petitioners'] * * * statutory righ[t] to speedy trial w[as] not violated.

Id. at 2a.

ARGUMENT

The Speedy Trial Act of 1974 generally requires that trial commence within 70 days of indictment. 18 U.S.C. 3161(c)(1). That 70-day period, however, is subject to expansion by periods of excludable delay. See *Henderson* v. *United States*, 476 U.S. 321, 326 (1986). In this case, the district court excluded delay attributable to petitioners' motions for continuances under 18 U.S.C. 3161(h)(8)(B)(iv) and to the pendency of pretrial motions under 18 U.S.C. 3161(h)(1)(F). Petitioners contend that exclusion of the delay was not proper under either provision. First, they argue (Pet. 7-18) that exclusion was improper under Section 3161(h)(8)(B)(iv) because the district court did not make specific findings, before granting the continuances, that the "ends of justice" warranted those continuances; instead, petitioners argue, the court provided only retroactive justification for the delays. Second, petitioners argue (Pet. 18-20) that exclusion of the entire period (November 2, 1987, to May 21, 1990) during which pretrial motions were pending was improper because the maximum amount of excludable delay attributable to motions for which hearings are not required is 30 days from the date of the last submission. We disagree and believe that the court of appeals properly concluded that petitioners' speedy trial rights were not violated.

1. Section 3161(h)(8)(A) excludes "[a]ny period of delay resulting from a continuance granted

by any judge * * * at the request of the defendant * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The period of the continuance will not be excluded unless "the court sets forth, in the record of the case, either orally or in writing, its reasons." *Ibid.* In this case, the district court plainly satisfied that record-keeping requirement. In denying petitioners' motion for dismissal for speedy trial violations, the district court explained in writing that defense counsel for petitioner Jaime Giraldo was continuously engaged in representing other clients during the period from September 10, 1987,[6] to May 21, 1990, and could not, with due diligence, effectively prepare for trial. The district court found that the "ends of justice served by the granting of successive continuances during [that period] outweig[h] the interest of the public and [petitioners] in a speedy trial." Pet. App. 6a. The district court specifically based its finding of good cause on the need for "continuity of counsel" and its conclusion that denying defense counsel adequate "time for preparation would be likely to produce a miscarriage of justice." *Ibid.*

Petitioners argue (Pet. 7-18) that those findings were insufficient because they were not made at the time the district court granted the continuances in question. But the courts of appeals uniformly

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[6] Petiitoners acknowledge (Pet. 3 n.2) that, for purposes of their appeal, the speedy trial "clock" began to run on September 10, 1987, when the district court granted their motion to withdraw their previously entered guilty pleas. See 18 U.S.C. 3161(c)(1).

have held that a district court need not set forth the precise reasons for its decision at the time a continuance is granted; it is permissible for the court to issue its explanation later. *United States* v. *Rush*, 738 F.2d 497, 507 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); *United States* v. *Lattany*, 982 F.2d 866, 877-878 (3d Cir. 1992), petition for cert. pending, No. 92-8187; *United States* v. *Carey*, 746 F.2d 228, 230 n.2 (4th Cir. 1984), cert. denied, 470 U.S. 1029 (1985); *United States* v. *Crawford*, 982 F.2d 199, 204 (6th Cir. 1993); *United States* v. *Tanner*, 941 F.2d 574, 583 (7th Cir. 1991), cert. denied, 112 S. Ct. 1190 (1992); *United States* v. *Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981); *United States* v. *Bryant*, 726 F.2d 510, 511 (9th Cir. 1984); *United States* v. *Doran*, 882 F.2d 1511, 1516 (10th Cir. 1989); *United States* v. *Vasser*, 916 F.2d 624, 626-627 (11th Cir. 1990), cert. denied, 111 S. Ct. 1688 (1991); *United States* v. *Edwards*, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980).

Petitioners correctly note (Pet. 11 & n.14) that the Act does not permit a district court to provide an after-the-fact justification for unauthorized delays by granting a retroactive ends-of-justice continuance. Rather, the court must consider the applicable factors at the time it grants the continuance, and the findings on which the court ultimately relies must be the factors that in fact motivated the court's decision to grant the continuance. See, *e.g.*, *Lattany*, 982 F.2d at 877; *Crawford*, 982 F.2d at 204-205; *Tanner*, 941 F.2d at 583; *Vasser*, 916 F.2d at 626; *Doran*, 882 F.2d at 1516; *Carey*, 746 F.2d at 230.

The record in this case, viewed in its entirety, supports the court of appeals' finding that virtually the entire delay in bringing this case to trial was caused by defense counsel's numerous requests for continuances—necessitated by his extensive involvement in other cases, to the exclusion of his ability to address this case—and that the district court properly granted ends-of-justice continuances in order to allow for continuity of counsel. To be sure, the district court did not make explicit "ends-of-justice" findings at the time it granted each of the continuances. But on September 28, 1987—at the time the district court granted the first continuance based on defense counsel's conflicting schedule—the court agreed to defer the trial only after it accepted defense counsel's argument that it should grant a continuance under the "continuity of counsel" clause of the ends-of-justice exception in 18 U.S.C. 3161(h)(8)(B)(iv). Sept. 28, 1987, Tr. 4-5. As the district court's opinion makes clear (Pet. App. 5a-6a), the district court's subsequent grants of continuances based on defense counsel's continued involvement in other cases rested on the implicit finding that continued accommodation of defense counsel's schedule would serve the ends of justice. None of the cases on which petitioners rely has found error in such a situation, where a court, contemporaneously with its decision to grant an initial continuance, sets forth on the record a valid basis for granting that continuance, and then implicitly relies on that same basis in granting subsequent continuances.

Petitioners correctly observe (Pet. 14-16) that the courts of appeals have taken different approaches as to the type of record that must be made at the time

an ends-of-justice continuance is granted. A few courts of appeals require the district court to indicate specifically at the time it grants the continuance that it is doing so based upon a balancing of the factors specified by Section 3161(h)(8). See *United States* v. *Brenna*, 878 F.2d 117, 122 (3d Cir. 1989); *United States* v. *Tunnessen*, 763 F.2d 74, 78 (2d Cir. 1985).[7] Most of the courts of appeals, however, do not insist on an explicit reference to the Speedy Trial Act at the time of the continuance, but instead require only that it be clear from the record that the court in fact considered the factors identified by the statute at the time it granted the continuance. See, *e.g.*, *Rush*, 738 F.2d at 507 (1st Cir.); *Carey*, 746 F.2d at 230 n.2 (4th Cir.); *United States* v. *Crane*, 776 F.2d 600, 606-607 (6th Cir. 1985); *Doran*, 882 F.2d at 1516

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[7] Petitioners err in indicating (Pet. 15) that the Eighth Circuit and the Tenth Circuit also have adopted that rule. First, they state that the blocked quotation from *Tunnessen* appearing on page 15 of the petition is in turn a quotation from *United States* v. *Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981). Although the *Tunnesen* panel did quote from the *Clifford* opinion on page 79 of its opinion, none of the material reproduced on page 15 of the petition appears in *Clifford*. Second, petitioner cites *United States* v. *Lewis*, 759 F.2d 1316, 1351-1352 (8th Cir.), cert. denied, 474 U.S. 994 (1985). That opinion, however, rejected a challenge in a case in which a record was made contemporaneously. It did not offer any guidance as to how it would treat a case in which the court did not contemporaneously refer on the record to the Speedy Trial Act. Finally, petitioners err in relying on the Tenth Circuit's decision in *United States* v. *Doran*, 882 F.2d 1511 (1989). As is evident from the petition's subsequent citation of that decision for the contrary proposition (Pet. 16), *Doran* in fact adopted the rule urged by the government, under which a continuance is adequate if the record as a whole indicates that it was based on suitable reasons.

(10th Cir.); *Vasser*, 916 F.2d at 626-627 (11th Cir.); *Edwards*, 627 F.2d at 461 (D.C. Cir.).

Although it is possible that the courts requiring a contemporaneous reference to the Speedy Trial Act would have overturned the judgment of the district court in this case—because the district court did not refer to the Speedy Trial Act specifically each time it continued the trial date—it also is possible that they would have found that the clear contemporaneous record the court made when it granted the first continuance was sufficient explanation for all of the subsequent continuances. In any event, there is no compelling need for a uniform standard for all circuits governing the requisite timing and explicitness of a district court's ends-of-justice findings. Such a standard does not directly affect the substantial rights of a defendant, but instead is a housekeeping standard that only balances the need for a trial court to have discretion over how it explains its decisions against the need for a reviewing court to have a record that clearly and accurately reflects the basis for the trial court's decisions. On such a question, there is no need for this Court to intervene to require precise uniformity in the manner in which courts of appeals regulate district court practice within their respective circuits.

Even if it were important to have a uniform rule on the question, this case would not be a suitable vehicle for considering the question, because petitioners' speedy trial claims would not succeed even if the Court adopted the uniform standard sought by petitioners. First, as discussed below, even if the time in question were not excluded by the "ends-of-justice" exception, it was proper to exclude it because of the

pendency of pretrial motions filed by petitioners. Second, in our view the conduct of petitioners' counsel in this case was sufficient to waive petitioners' rights under the Act. Because the Act was passed "not only for the benefit of criminal defendants, but also out of concern for the interest of the public in seeing that justice is done without great delay," courts have not lightly found that defendants have waived their rights under the Act. *United States* v. *Kucik*, 909 F.2d 206, 210 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991). In egregious situations, however, courts have been unwilling to require dismissal of an indictment on the basis of delay caused by the defendant, even if the delay was not excludable under any particular provision of the Act.[8]

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[8] See *United States* v. *Noone*, 913 F.2d 20, 28 (1st Cir. 1990) ("[T]he Speedy Trial Act allows for the exclusion of delays occasioned by a defendant's unnecessary prolongation of the proceedings."), cert. denied, 111 S. Ct. 1686 (1991); *United States* v. *Pringle*, 751 F.2d 419, 434 (1st Cir. 1984) (a defendant may not "use the waiver-induced leisurely pace of the case as grounds for dismissal"), vacated on other grounds *sub nom. United States* v. *McAfee*, 479 U.S. 805 (1986); *United States* v. *Eakes*, 783 F.2d 499, 504 (5th Cir.) (refusing to order dismissal where the defendant had obtained a continuance for an invalid reason), cert. denied, 477 U.S. 906 (1986); *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987) (excluding delay occasioned by the need to reschedule an arraignment due to the failure of the defendant and defense counsel to appear at a previously scheduled arraignment); *Kucik*, 909 F.2d at 211 ("a defendant [who] actively participates in a continuance covering a discrete period of time * * * cannot then 'sand-bag' the court and the government by counting that time in a speedy trial motion"); see also *United States* v. *Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989) ("defendants ought not to be able to claim relief on the basis of delays which they themselves deliberately caused").

Because petitioners' counsel was directly responsible for almost all the delay in this case, it would not be appropriate to reward petitioners by dismissing the indictment.

2. The period from November 2, 1987, to May 21, 1990, also was excludable because of the pendency of pretrial motions.[9] Section 3161(h)(1)(F) excludes from statutory speedy trial calculations "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." The provision broadly applies to all pretrial motions, whether or not they actually cause a postponement of trial. *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (exclusion is automatic).

On November 2, 1987, Luis Giraldo filed a motion for discovery. The hearing on that motion was scheduled for December 21, 1987; when counsel for Jaime Giraldo failed to appear on that date, the hearing on the discovery motion was continued until January 4, 1988, at which time the district court denied the motion. Accordingly, the period from November 2,

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[9] Although there apparently was no motion pending during the first portion of the period challenged by petitioners (from September 10, 1987, to November 2, 1987), see note 4, *supra*, the pendency of the motions nevertheless constitutes an adequate basis for affirmance of the judgment. That is so because the September 28, 1987, continuance of the trial to December 8, 1987, apparently was adequate even under petitioners' view of the law; in a finding made at the time of that continuance the court indicated that Luis Giraldo's need for continuity of counsel was sufficiently serious that the ends of justice required a continuance, Sept. 28, 1987, Tr. 4-5. Given the adequacy of that continuance, the only time period realistically in dispute is the period from December 8, 1987, to May 21, 1990.

1987, to January 4, 1988, was excludable based on that motion.[10]

That same day, Jaime Giraldo filed a motion to dismiss based on prosecutorial misconduct. On February 10, 1988, the government filed a motion to quash certain subpoenas that had been issued in connection with the dismissal motion. At the time of the May 21, 1990, hearing on the motion to dismiss for speedy trial violations, the court (albeit through its own oversight and the oversight of both parties), had neither conducted a hearing on those two motions nor ruled on them. Accordingly, the entire period of time from November 2, 1987, to May 21, 1990, constituted excludable delay under the Act. See *Henderson* v. *United States*, 476 U.S. 321, 330 (1986) (the entire period between the filing of a motion and a hearing on the motion is excluded under the Act whether or not a delay in holding that hearing is "reasonably necessary").

Relying on *Henderson*, petitioners argue (Pet. 19-20) that because a hearing was not required on their motion to dismiss, the period of time excludable under the pretrial motions exception in the Act terminated 30 days from the date of the last submission by either party, which in this case was March 7, 1988 (when the government filed its final brief in connection with the motions). See *Henderson*, 476 U.S. at 331 (for motions decided on the papers without a hearing, the subsection (h)(1)(F) exclusion normally ends when all of the papers pertaining to the motion are filed with the court). In this case, however, *Henderson* is inapplicable because the dis-

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[10] Petitioners do not contest the portion of the delay attributable to the discovery motion. See Pet. 18-20.

trict court contemplated that a hearing would be necessary to resolve the motion to dismiss for prosecutorial misconduct.

Petitioners correctly note (Pet. 20) that the government attempted to have the motion dismissed without a hearing; on February 10, 1988, the government filed a motion to quash the subpoenas that had issued in connection with the motion and to deny an evidentiary hearing on the motion to dismiss, arguing that an evidentiary hearing was unnecessary because the motion contained no factual statements supporting the claim. Gov't C.A. App. 79-87. But on February 22, 1988—the date scheduled for the hearing on the motion to dismiss—petitioners filed a memorandum setting forth a factual basis for the claim of government misconduct (supported by the declaration of Adiela Bustamante Solorzana). *Id.* at 107-120. Petitioners urged in the memorandum that Solorzana's declaration demonstrated a basis for requiring a full evidentiary hearing. *Id.* at 108, 112, 113-114. At a status conference conducted that same day, the district court continued the hearing on the motion in order to allow the government an opportunity to investigate and respond to the allegations in the defense memorandum. The court stated its view that the declaration made "very serious allegations" about the police officers involved in the case, Feb. 22, 1988, Tr. 5; that it could not at that time resolve the charges, which would require "some sort of a confrontation between the [officers charged with wrongdoing] and Solorzan[a, who was then in Colombia]," *id.* at 5-6; [11] and that Solorzana should

[11] The court's concern about the allegations was conveyed with considerable emphasis; among other things, the court

be brought to the United States to testify concerning the charges, *id.* at 6-7. The court then gave the government two weeks within which to respond to the charges raised in the memorandum and scheduled a hearing on the matter for March 16, 1988. *Id.* at 20; Gov't C.A. App. 15. For reasons undisclosed in the record, however, the hearing did not take place at that time and the district court thus did not rule on the motion to dismiss at that time.[12] Hence, because the court contemplated conducting a hearing on the motion to dismiss, and in fact scheduled such a hearing, the motion was not submitted before May 21, 1990 (when petitioners again agreed to plead guilty). Thus, the entire period of time from the filing of the motion until May 21, 1990, was excludable under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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cautioned the prosecutor that he "should tell those [police] officers that were they ever to be caught not telling the truth about this, they're dead meat." Feb. 22, 1988, Tr. 11-12.

[12] As stated in note 3, *supra*, the hearing apparently was not held because of the schedule of Jaime Giraldo's counsel.

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